Case Number: 2301531/20
and 2301532/20

JB

THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
1) Mr J Massey **2) Mr T Wibrew**		**Mitie Limited**

Held at London South **On 12 13 and 14 October 2021**

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimants: **In person**

For the Respondent: **Mr Ahmed, Counsel**

RESERVED JUDGMENT

The decision of the tribunal is that

1. The claims of unfair dismissal are not well founded and they are dismissed.
2. The First Claimant's claim for breach of contract succeeds in part. The Respondent is ordered to pay the Claimant the sum of £2904.68 by way of damages for breach of contract in relation to a failure to pay him commission.

RESERVED REASONS

1. The Claimants both claim that they were unfairly dismissed after they were made redundant by the Respondent in November 2019. In addition the First Claimant claims breach of contract in relation to a failure to pay him commission throughout his period of employment.

2. The hearing took place over three days and the parties attended in person. I heard evidence from both Claimants, from Nick Heath, Regional Director for Mitie Cleaning, Robert Kneale who is also a Regional Director and from Jacki Cooper, Operations Director.

3. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.

4. The Claimants were both employed in a division of the Respondent's business known as Mitie Cleaning. Within that division, they worked in two of the specialist services: technical cleaning supervisors service (TCS) and window cleaning respectively. In November 2019, Ms Cooper was their line manager.

Contract of Employment of the First Respondent

5. The First Claimant commenced employment with the Respondent on 12 December 2016.

6. At page 127 of the bundle there is an offer of employment to the First Claimant made on 2 December 2016 offering him a salary of £42K. There is no mention of commission in that document or in the accompanying contract of employment.

7. It appears that the First Claimant made an internal move in 2017. There is an email dated 20 September 2017 at page 154 of the bundle from PT, director of cleaning and specialist services, to the First Claimant offering him a new position with a salary of £50K plus bonus and benefits. A second email dated that evening says:

> *'One item that I did not put was commission. If you bring in any sales from your own prospecting or upsell additions to current contacts you will be eligible for commission payments – Rates yet to be fully agreed with the whole team but will be around 3% jobs and 6% contracts based on revenue not margin, subject to price list hourly rates. This will be capped at 3K per sale (unless otherwise agreed by me in advance of the sale). I think you could easily add another 5-15K per year on this basis. So your potential earning could well be between 60-75K'*

8. There is a document headed 'changes to your contract of employment' which is dated 3 October 2017 (page 157). This document states that the First Claimant's new job title will be Head of Operations London TCS. The salary is £55K and 'commission rates to be agreed'.

9. On 5 October 2017 the First Claimant emailed PT and asked him to confirm the commission rates. On the same day, PT replied that 'I will set out the commission values and rules for all soon but it looks likely they will be – 3% for a lead and 6% for a contract'.

10. The First Claimant replied: 'Please could I request that the below information is ratified and included in my contract offer to prevent confusion in the future?'

11. PT replied at 13.52 on 5 October to say: 'James just sent you the commission rules and values. I won't put these in the document as these values could change upwards as time progresses. But at moment I have kept them low due to modest GP'.

12. The First Claimant did not have a copy of the 'commission rules and values' referred to. He said this document simply reflected the rates referred to above. I asked the Respondent to make a search to see if this document could be retrieved. They were not able to produce any additional document.

13. The First Claimant signed a letter dated 16 October 2017 headed 'changes to your contract of employment'. This refers to a salary of £55K. Once again it states 'commission rates to be agreed'.

14. The only other contractual document relating to the First Claimant is a document dated 27 April 2018 relating to him being awarded a car allowance, but this states that the rest of his contract would remain unchanged.

The role of the Second Claimant

15. The Second Claimant commenced employment with the Respondent on 1 May 2013. At the date of termination of his employment, he held the role of Head of Operations, Specialist Services. His role focussed on window cleaning operations.

Background to the Redundancies

16. In addition to the Claimants there were three other regional managers or 'heads': a Head of Operations for Scotland, a Head of Operations for the North and a Head of Operations for Windows (Scotland and North). The Claimants between them, and within their respective divisions, had responsibility for the management of all contracts in London and the South. They were based in London. The other heads of operations were based in Birmingham and Scotland respectively.

17. Ms Cooper agrees that the work could be very stressful at times. She describes her relationship with the Second Claimant as 'fraught'. In July 2018 he resigned his employment. Very soon afterwards he wished to retract this. Ms Cooper would not agree to this and the Second Claimant raised a grievance. After this had been considered, Ms Cooper was asked to reinstate him, which she did.

18. In relation to the First Claimant I have noted that there had been issues over his expenses. Ms Cooper agreed that she had challenged the First Claimant over his travel expense claims although these had ultimately been revised and approved. I have noted that in an email to Ms Cooper dated 25 June 2018, the First Claimant writes: 'just so you are aware there are other elements of my contract with Mitie that have not been delivered such as the commission rates, life cover and private medical insurance' (page 178 of bundle).

19. In early 2019 the Claimants both had concerns that revenue that was being earned within their respective business areas was being wrongly ascribed to other regions in the north of the UK. A project commenced at the start of the Financial Year 2019/20 to ensure that all costs and revenue were properly aligned to the correct region. A consultant, AF, was brought in to assist with this project. The Second Claimant produced a bundle of correspondence relating to the project at the start of this hearing and Mr Ahmed did not object to the documents being admitted. It is the Respondent's case, which I accept, that this project had been completed by October 2019 (after the end of period 6 in the Respondent's accounting year). The emails produced by the Second Claimant start in May and the latest email is dated 23 August 2019. I am satisfied on the balance of probabilties that the process of realignment of contracts had been completed by the time mid-year figures were available at the beginning of October 2019.

20. In September 2019 Ms Cooper told the Claimants and other regional managers at a meeting that Mitie TCS and Windows divisions were doing well as a whole.

21. Mr Heath had been employed by the Respondent since February 2019. At the start of October 2019 he joined Mitie TCS and became the line manager of Ms Cooper.

22. The First Claimant says that he had a meeting with Mr Heath soon after this. He says, and Mr Heath accepts, that he was asked whether his managers could cope without him. The First Claimant asserts that this is evidence that Mr Heath was planning to move him out of the business. Mr Heath says that he asked this question of all his regional managers. He asked the question for succession planning purposes and in the interests of improving operational efficiency.

23. Mr Heath started to carry out a review of the operational areas under his management to see where efficiency could be improved and the business made more cost effective.

24. It was the practice of the Respondent to produce financial reports relating to its operations on a monthly basis. It is the Claimant's case, which I accept, that the figures provided to them set out the revenue earned within their divisions and the contract costs. Staff costs and management overheads were recorded separately and the monthly figures given to them did not usually take these into account. There was also a detailed review of progress at the mid-year point ie after the end of September (period 6 in the Respondent's year). The evidence of Ms Cooper, which I accept, is that following the end of September 2019, she was able to see a 'snapshot' of the performance of the various regions by the second or third working day of October 2019. The mid-year figures were provided to Ms Cooper by CW who was a newly appointed Finance Business Partner for Ms Cooper's area of operations. This information was also made available to Mr Heath.

25. It is the Claimants' case that the figures presented at the end of period 6 could not be relied upon as they did not take into account the need to re-align accounts to the correct region. The evidence of Mr Heath and Ms Cooper was that the re-alignment process had completed by October 2019 and therefore that the mid-year figures were 'clean'. The process had been undertaken by AF with the assistance of the Claimants and had been completed by CW following his appointment. For the reasons stated above I accept the evidence of the Respondents on this point.

26. Having considered the picture of the mid-year position that was presented, Mr Heath realised that the two business areas being managed by the Claimants (TCS (London and South) and Windows (London and South)) had made substantial losses for the year to date, once overheads had been factored in. He stated that the strong performance in other regions was masking the fact that these areas were loss-making. He reported this picture to all the regional managers when he met with them for the first time in early October 2019. It is the Claimants' case that this was the first time that they were provided with the full information specific to their business divisions, and that previously all financial information they had received focussed on their relevant revenue and costs without taking into account central overheads. This was not disputed.

Ms Cooper stated that the full picture was always available for them to look at as they were running the respective business areas. I accept that it is likely that the Claimants could have established the true financial position but that this would have involved them in seeking out additional financial information over and above what the monthly reports presented. I will simply note at this point that I accept that the news came as a considerable surprise to the Claimants as they had understood from the September meeting that everything had been going well.

27. Mr Heath and Ms Cooper moved quickly. I have noted an email dated 2 October 2019 in which HR asked payroll to provide details of redundancy calculations for members of Ms Cooper's division. The copy of the email provided in the bundle had been redacted so that it was not possible to see for whom calculations had been requested. During her oral evidence Ms Cooper said that she had only requested calculations for the two Claimants and not for the other heads of operation. However during the course of the hearing the Respondent was able to obtain a copy of the original email. This showed that HR had requested calculations not only for all the regional managers but also for Ms Cooper herself.

28. After discussion with Ms Cooper, Mr Heath put together a proposal for a restructure and this was signed off by the managing director. The restructure affected the two business divisions operated by the Claimants in London and the South but not the other regions. Under the plans, the existing posts occupied by the Claimants would disappear and be merged with one post of Head of TCS and Windows in London and the South. This meant that whereas there had previously been five divisional heads, there would now be four. Ms Cooper agreed that by this point a decision had already been taken that no changes would be made to divisions that were currently profitable in Scotland and in the North. No other heads were to be put at risk of redundancy.

29. On 12 November 2019 Ms Cooper made a presentation to staff including the two Claimants. It was entitled 'TCS and Window Ops Changes'. I have seen copies of the slides from the powerpoint presentation (page 278) which states

that ‘across the 2 business areas in the financial year to date we have lost c£250k’. Two slides were presented: one set out the current management structure, the second was headed ‘proposed structure’ and showed the reduction of regional head posts from five to four, with a new post called ‘Head of TCS and Windows (London and South)’. There was also a reduction of staff from three to two in lower staffing levels. The presentation advised that some staff would be placed at risk of redundancy. A timetable for consultation was provided. Staff were advised that they could apply for the new role of Head of TCS and Window Ops for London and the South. On page 282 it is stated that ‘This is a new role and not deemed a reasonable alternative and therefore slotting in is not applicable’.

30. The presentation was followed by individual consultation meetings with the two Claimants to confirm that they were at risk of redundancy as their existing posts would disappear. Four other members of staff were also put at risk.

31. I have read the meeting notes for both Claimants. A template record sheet was used and this reads ‘please note: the employee must also be offered the opportunity to suggest ways in which Mitie could avoid redundancy’. Both Claimants indicated an intention to apply for the new role. It was noted on the form that the role would be protected at the moment but if the Claimants were unsuccessful it would be advertised externally (page 308). The Claimants dispute that this is an accurate record of what was said at that meeting. They both say that they are told that the role would be reserved for one of them. On balance, I give weight to the near-contemporaneous note of the meeting with the First Claimant that was taken not by Ms Cooper but by the HR representative who was in attendance. I accept that it is more likely than not that the Claimants were told that the role would only initially be protected but that Ms Cooper indicated to them that each of them had a good chance of getting it. That may have led to both of them forming the view that one of them was bound to get it. However the statement made at the meeting was an important one and I find on the balance of probabilities that HR would have recorded it accurately.

32. The Respondent decided to recruit to the new role by adopting a competitive interview process. Both Claimants would be asked to make a presentation and to answer questions. The Respondent provided the Claimants with a list of areas that the presentation should cover in an email dated 13 November 2019 (page 319).

33. The interviews took place in the week commencing 18 November 2019. Both Claimants complained that this gave them insufficient time to prepare. I have noted that the first consultation meeting with the Claimants took place on 12 November at which they both indicated an intention to apply for the role. They received the presentation topics the following day. They therefore had at least five days to prepare including a weekend. Both of them said that they were not prepared to work at the weekend, thus reducing the time available. That was a personal decision for each of them. However both of them said in evidence that after the 12 November they realised that their jobs were at stake. They could have used time at the weekend to work on their presentations if they wished to do so. I take into account also that each of them was given an equal amount of time. In all the circumstances I find that the time provided for preparation prior to the interview was reasonable.

34. The interviews were conducted by Mr Heath and Ms Cooper. They decided to adopt a marking system as a way of measuring performance at the interviews. Their marking sheets are included in the bundle at pages 309-317. The presentation topics are at the top of the page with the marks next to them. There is then a list of thirteen questions to be asked of each candidate. Each presentation topic and answer was marked out of 5. It is the evidence of Mr Heath and Ms Cooper, which I accept, that each of them marked the Claimants independently. They compared notes and scores at the end. Both of them have provided the sheets they completed with their handwritten annotations and scores. There is no evidence to support the Claimant's contention that these score sheets may have been created 'after the event'.

35. It was also decided that each of the Claimants would have to achieve a pass mark of 75% before the Respondent would consider appointing them to the role.

36. The scores for the First Claimant are at page 318. Mr Heath awarded him 36 points and Ms Cooper 39. That was an overall score of 52% of possible marks.

37. The scores for the Second Claimant are at page 342. Mr Heath gave him 35 points and Ms Cooper 37, an overall score of 49.5%.

38. Second consultation meetings took place with both Claimants on 22 November 2019. Ms Cooper informed them that they would not be appointed to the new role. For the first time, she mentioned the 'pass mark' of 75% and stated that neither of them had achieved it. They therefore continued to be at risk of redundancy, but redeployment was an option. They would be sent a link by HR and could apply for any vacancies across the company. Both Claimants indicated an interest in redeployment and completed a redeployment form. The Second Claimant asked for more feedback about his interview performance. He was eventually provided with his interview scores on 26 November 2019 (page 341-342).

39. At page 336 there is an email from HR asking a number of managers if they had any vacancies in their business areas that might be suitable for the Claimants.

40. A final consultation meeting took place a week later on 29 November 2019. As neither Claimant had applied for any other role, they were advised that they would be made redundant with effect from 30 November 2019. They would receive a payment in lieu of notice. They were advised that they had a right of appeal and that any appeal should be sent to Nick Heath.

41. The Second Claimant appealed on 3 December 2019. He complained that they had not been told about the 75% pass mark. He had believed that

whoever scored the most points would be appointed to the new role. He pointed out that in September the Claimants had been told that the business was doing well. He said that he had completed a review meeting in September where no concerns were raised about his performance.

42. The Second Claimant's appeal was heard on 18 December 2019 by Robert Kneale, from whom I heard evidence. The appeal notes start at page 420 and run for over eleven pages.

43. Mr Kneale's decision on the appeal dated 2 January 2020 is found beginning at page 450 of the bundle. He summarises the main points of the appeal and deals in some detail with the scoring process. On the question of the finances, he accepted that the Second Claimant had not been made aware during team meetings that there was any concern over the profitability of the business. However Mr Kneale states that he would have expected that someone receiving a salary at the level of the Second Claimant would have been aware of the difference between gross and net profit. That aside he concluded that given the financial performance of the business unit, redundancies were unavoidable as a means of saving costs. He dismissed the appeal.

44. The Second Claimant complained that Mr Kneale did not spend sufficient time considering the appeal. The hearing took place just before Christmas, Mr Kneale had some leave over that time and the decision was communicated on the first working day after new year. Mr Kneale gave evidence, which I accept, that over this period he spoke to both Mr Heath and Ms Cooper and reviewed the financial situation. The appeal meeting was quite lengthy and went into some detail. The outcome letter deals with each of the main points of appeal. It is clear from this that Mr Kneale accepted the business case for redundancy that had been made and felt that the interview scoring process had been reasonable. I find that the appeal was conducted reasonably. The Second Claimant was given a full opportunity to raise the points that he wanted to challenge and Mr Kneale gave proper attention to his concerns.

45. The First Claimant appealed on 6 December 2019. He objected to Mr Kneale hearing his appeal. Another manager, DH, was asked to conduct the appeal. She did not give evidence and I understand that she has left the employment of the Respondent.

46. The First Claimant's appeal hearing took place on 17 December 2019. I have seen the notes of this meeting which start at page 408 and run to ten pages. I have noted that the First Claimant complained about the scoring method at interview and the fact that the role had not been ringfenced. Not all the regions had been included in the process. He felt it was a bad business decision.

47. DH recorded her decision on the appeal in a letter dated 7 January 2020. She did not uphold the appeal. She noted that not all the regions had been included in the restructure process, but observed that the other regions were profitable and therefore out of scope. She did not accept that the First Claimant had been told that the new position had been reserved for one of them, based on the meeting notes. Regarding the scoring process at interview, she said that it was not her experience that details of a scoring system were provided to candidates in advance. She noted the First Claimant's concern that one of the other Heads of Operation had been appointed to the new role without interview. She stated that this person (CWE) was covering the role on an interim basis whilst recruitment proceeded. She rejected concerns that Ms Cooper was biased and she pointed out that the First Claimant had raised no concerns about her behaviour previously. She accepted that no prior concerns had been raised about the First Claimant's performance but said that this was not in question and did not affect the redundancy case.

48. I heard some evidence about what had happened following the end of the redundancy process. The Claimants said, and the Respondent accepted, that no-one has been appointed into the new combined role of Head of Operations for London and the South. The role continues to be filled by CWE under the supervision of Ms Cooper. The Respondent's case on this is that following the redundancy of the Claimants they sought to advertise externally for the role but

did not appoint anyone. Following the introduction of pandemic restrictions and the 'work from home' instruction, their business decreased substantially and recruitment was paused. I explained to both parties that I would be considering the position as at the date the Claimants' employment terminated. However I accept that what happened to this role after November 2019 is relevant to some extent to the Claimant's case that there was in fact no redundancy situation in November 2019. I will return to that argument below.

Decision

The Unfair Dismissal Claims

49. Under section 98(1) of the Employment Rights Act 1996 the first question for me to consider is the reason for the dismissal of the Claimants and whether this is a potentially fair reason failing within section 98(2).

50. The Respondents say that the Claimants were dismissed because of a genuine redundancy situation (as defined in section 139).

51. The Claimants say that there was no redundancy situation. They dispute the assertion that their divisions were making substantial losses and question the figures. They assert that Mr Heath and Ms Cooper had a pre-determined plan to get rid of them and that the process was a sham.

52. I turn first to the financial situation. It is clear that the Claimants have no confidence in the estimations of loss presented by the Respondents in November 2019. They point to the contrast between statements made in September that the business was doing well and that senior management were pleased with performance in Mitie Cleaning; and the statement just a few weeks later that their divisions were making a loss. They state that they had never been given net monthly figures taking into account central overheads. Despite the re-alignment exercise that had taken place in the summer of 2019, they understood that this was a 'work in progress'. They are concerned that the financial picture presented in October 2019 was inaccurate as the revenues

from many contracts may still have been assigned to the wrong regions. They point out that they were never shown the mid-year review accounts.

53. I accept that the presentation given to the Claimants on 12 November 2019 came as a real shock to them. It seems they had been operating under a false sense of security because of the way in which the monthly figures had been presented to them. However for the reasons set out above I accept that the realignment project, with which the Claimants had been heavily involved and which had been led by an independent consultant, had been substantially concluded by the end of September. There may well have been some remaining discrepancies, but I have noted that this issue was not raised during the redundancy consultation process. It was only brought up by the Second Claimant at his appeal.

54. In relation to the losses revealed by the half yearly review, I accept the evidence of Mr Heath and Ms Cooper that the figures were provided to them by their Finance Business Partner, CW. Whilst I am unable to conclude on the basis of the evidence in front of me that there were no errors in these accounts I accept that CW advised Mr Heath and Ms Cooper that they took into account the realignment exercise that had taken place. There is no evidence that the figures had been fabricated or misrepresented. I find on the balance of probabilities that the information reported to Mr Heath and Ms Cooper represented the best evidence available to the Respondent at that time as to the performance of the London and South divisions. In any case, even if there were inaccuracies within these figures, Mr Heath and Ms Cooper were entitled to rely upon the accounts provided to them by CW in his role as Finance Business Partner. Finally I take into account the fact that at no point during the redundancy consultation process did either of the Claimants request to see either the mid-year accounts or the detailed data behind them in order to ascertain for themselves whether the figures were accurate.

55. I go on to consider the allegation that Mr Heath and Ms Cooper were determined to remove the Claimants from the business and pre-determined that they would be made redundant as part of a sham exercise.

56. Ms Cooper makes it clear in her statement that her relations with both managers had not always been entirely smooth. She describes her relationship with the Second Claimant as 'fraught at times'. She deals with the expenses issue that arose with the First Claimant. I contrast this with the fact that Ms Cooper makes positive comments about both Claimants in the reviews she conducted with them in September 2019.

57. The First Claimant also relies upon the fact that Mr Heath asked him whether his managers 'could do without him' in support of the assertion that there was a pre-determined plan to remove him and the Second Claimant from the business.

58. Having considered the evidence as a whole I have reached the conclusion that there was no concerted campaign to ensure that the Claimants would be made redundant. As at the start of October 2019 the Claimants had little idea that their business areas were showing a substantial loss. This may have been due to the way in which the monthly figures were presented to them. It may also be that they had not taken it upon themselves to look into the effect of central overheads on the overall business position. There certainly seems to have been no suggestion from Ms Cooper who was their line manager at any time up to October 2019 that their divisions had been performing badly for the first six months of the financial year. Mr Heath came into the operation with new eyes from around this time. The Claimants described him as a 'numbers man'. His stated aim, which I accept was genuine, was to reduce costs and improve operational efficiency. He started to look at the underlying financial position, which became clear in early October. He realised that although the specialist cleaning divisions were in profit overall, this disguised the fact that the London and South divisions were making losses. Operations in the North and Scotland, which were profitable were masking this fact.

59. I find that it was Mr Heath, not Ms Cooper, who was the driving force behind the restructure that commenced in November 2019. She had told her team in September that everyone was doing well. There was a distinct change of direction in October after Mr Heath joined and after the mid-year accounts became available. I accept that it was Mr Heath who presented the restructure proposal to the managing director of the company, after consultation with Ms Cooper. It was then her task, as the Claimant's line manager, to implement it. I am not able to conclude that the decision to carry out the restructure was affected by personal animosity from Ms Cooper towards the Claimants.

60. As for Mr Heath, there is little evidence that he had any reason to unfairly target the Claimants. I have considered the evidence of the First Claimant about the conversation they had in October 2019. It is not in dispute that Mr Heath asked him if his managers could manage without him. I find on balance that this question was not asked with an intention of removing the First Claimant from the business. It is not an unreasonable question from an incoming senior manager to one of his heads of operations in terms of understanding how effective his managers are and how the organisation of management functions could be improved. I accept Mr Heath's evidence as to his motivations for asking the question.

61. Having considered the case put forward by the Claimants on these matters, I conclude that Mr Heath decided in October 2019 that the London and South operations should be restructured, and one post removed, in light of the significant losses for those divisions revealed by the mid-year accounts. I find that the decision to remove the separate posts of head of operations for TCS and Windows, and create one combined role for the region in order to save costs, demonstrates that the Respondent's requirement for managers at this level in the place where the Claimants were employed (the London and South regions) had diminished. This meets the definition of a redundancy situation within section 139(1)(b)(ii) of the Employment Rights Act 1996.

62. I go on to consider whether the Respondent acted reasonably in treating this as a sufficient reason for dismissing the Claimants in accordance with section 1984 ERA 96.

63. In redundancy situations, the case of *Williams v Compair Maxam* [1982] UKEAT 372 sets out the now well-established guidance as to what an employer is expected to do before making an employee redundant. The principles are that: the employee must be warned that he or she is at risk of redundancy; there must be consultation over ways of avoiding the dismissals; a fair selection process must be established and it must be applied fairly; and the employer must consider whether alternative employment can be offered to the employees. I deal with each of these in turn.

64. In terms of consultation, I note that three meetings took place with each Claimant. At the first, on 12 November 2019, they were advised about the proposed restructure and warned that they were at risk. The second meeting took place on 22 November and the Claimants were advised that neither of them had been successful in obtaining the new role. Their redeployment options were explained to them. Finally at a meeting on 29 November the Claimants were told that they would be made redundant with effect from 30 November 2019. In total, the consultation period took just over two weeks.

65. The Claimants point out that they had very little time to assimilate the serious financial picture that had been presented to them on 12 November. They were focussed on saving their jobs and on applying for the new role. They argue that consultation was inadequate. They suggest, given the sudden change in the assessment of their division's performance, that the Respondent should have given them a period of time in which to try and turn the business around.

66. I agree that this is an option that the Respondent could have considered. However there are two points to make about this. The first is that this was a business decision. It would not be appropriate for me to substitute my view on

what should have happened. The question of how to address the results of the mid-year review was a matter for the Respondents.

67. The second point to make is that this was not a proposal that was made by either Claimant during the consultation process. I can understand why. The situation came as a considerable shock to them. Each of them may have had high hopes of being appointed to the new role. Having read the records of the consultation meetings however I am satisfied that they were given an adequate opportunity to suggest alternatives to redundancy. It is of note that at the first meeting on 12 November the First Claimant stated that he agreed that the Respondent could not sustain losses in the South and that the Second Claimant noted that the South as a whole was struggling with revenue. But neither put forward a practical alternative to the restructure and cost-cutting proposals.

68. I turn to the question of the selection process. The Claimants concerns about how this was handled goes to the heart of their unfair dismissal claims.

69. The first point that they make is that the selection pool should not have been confined to themselves. There were five heads of operations prior to the restructure, with that number being reduced to four. They argue that all five heads should have been considered for selection for redundancy.

70. The Respondents say that they decided that they would only put at risk the two heads of operations who were directly affected by the proposed restructure, ie the two London and South roles. They point out that the other regions were in profit. They considered that there was no point in disrupting arrangements within those areas. They were treated as ‘out of scope’.

71. I have considered these arguments carefully. Even though redundancy calculations were sought for all heads at the start of October, it is clear from Ms Cooper’s evidence that a decision was made fairly rapidly to confine the pool to the Claimants. Again I agree with the Claimants that the Respondents could

have included all heads of operations in the pool. However the test under section 98(4) is whether the Respondent's actions were reasonable. It is not for me to substitute my view as to what I would have done in the same situation. Instead I must consider what options were reasonably open to the Respondents. I find that the Respondents had a genuine business reason for treating the North and Scottish regions as out of scope, namely that they were not loss-making. As Mr Heath put it, these regions had been 'holding up' the performance of the Windows and TCS services as a whole. There is a further point in that whereas the Claimants were based in London, the other heads were based in the North of the country. There was no reduced requirement for management roles in these areas. In all the circumstances I find that the decision to confine the redundancy pool to the Claimants was within the reasonable range of options open to the Respondent.

72. The Claimants next complain about the method of selection adopted for the new Head of Operations role. They argue that one of them should have been appointed to the role. The scoring system was unfair and applied unfairly, and they should have been warned in advance that the Respondents were applying a pass mark of 75%.

73. The Respondents had a choice here. They could have decided to apply redundancy selection criteria to the two Claimants, make one of them redundant and appoint the other into the role. Instead, they decided upon a competitive interview process and did not guarantee that either candidate would get the role. Was that reasonable?

74. I have considered the differences between the previous roles and the new role. The presentation on 12 November states that this was a new role which would not be deemed a reasonable alternative and that no-one would be 'slotted in' to it. Ms Cooper states in her witness statement that 'a different skill set was required, someone with the ability to lead a new team and drive the business forward'. Mr Heath suggests that the two Claimants had been 'silo-ed' in their respective divisions and had little knowledge of the other's specialist areas. I

am unconvinced by these arguments. The new role appears to be very similar to the old ones, save for the fact that two business divisions (Windows and TCS) were being combined. The new role would sit alongside the other heads of operations roles in the new structure, just as the previous roles had done. I find that Mr Heath is doing the Claimants a disservice by arguing that they did not have the skills to run the other's area of operations. Both had significant management experience in the sector and the Second Claimant had been carrying out a combined role in 2018 under a previous director of operations, PT. I accept however that the new role involved enlarged *responsibilities* including a greater number of staff to manage, additional contracts and greater revenue. In addition I accept that the Respondent wished to be assured that whoever was appointed would be in a good position to turn the loss-making divisions around. On balance I find that the new role was sufficiently different to the previous roles, in terms of the increased responsibilities, to make the adoption of a competitive interview process reasonable in the circumstances. In any event, once the restructure was underway, it was always the case that one of the Claimants would have lost their job. The Respondent would have had to adopt some method of selection between them and its decision to treat the process as one of selection for a new combined role was within the range of options reasonably open to them.

75. In light of that finding I consider the guidance given by HHJ Richardson in the case of *Morgan v The Welsh Rugby Union* UKEAT/0314/10. As in this case, the claimant had been made redundant after applying for a new role created as a result of an internal reorganisation. The Employment Appeal Tribunal considered what standards an employer was expected to meet in relation to the selection process for a new role in such a situation.

76. I refer to paragraph 36 of the judgment which reads as follows:

> '*To our mind a Tribunal considering this question must apply section 98(4) of the 1996 Act. No further proposition of law is required. A Tribunal is entitled to consider, as part of its deliberations, how far an interview process was objective; but it should keep carefully in mind that an employer's assessment of which candidate will best perform in a new role is likely to involve a substantial element of judgment. A Tribunal is entitled to take into account how far the employer established and followed*

through procedures when making an appointment, and whether they were fair. A Tribunal is entitled, and no doubt will, consider as part of its deliberations whether an appointment was made capriciously, or out of favouritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its finding under section 98(4)'.

77. In the present case, it is clear that the Respondent gave some thought to how the interviews would be conducted before they took place. The Claimants were given advance notice of the presentation topics they would need to cover. They had a reasonable period of time in which to prepare. A list of questions was drawn up and the same questions were addressed to both of them. I accept on balance that Mr Heath and Ms Cooper scored each of the candidates independently and then compared notes. Their views were reasonably, but not uniformly, consistent. When the Claimants challenged the marks given, at the appeal stage and during these proceedings, both witnesses had reasonable and credible answers as to why they awarded the marks that they did for each question. I accept that reasonable efforts had been made to ensure that the interviews were fair and objective.

78. The Claimants consider that they should have been told in advance that there was a pass mark. It seems to me that the figure of 75% was fairly arbitrary. It was not linked to any specific written standards or to the job specification. I accept however that the Respondent wanted to ensure that a strong candidate was appointed to the role. They resolved only to appoint one of the Claimants if they performed well at interview. The selection of a pass mark reflects that. Whilst the process cannot be said to have been entirely objective, as it depended upon Mr Heath's and Ms Cooper's subjective assessment of how the questions were answered (as in most recruitment interviews), it was at least linked to a basic scoring system.

79. I have to agree with Mr Ahmed that knowledge of the pass mark would not have made any difference to the Claimants. They both knew that they were at the very least competing against each other. Both said that they prepared for the presentation and tried their best. They may have assumed that one of them would get the job (although as I have found this is not what they were

told). The fact that they were told that the job would be advertised externally if neither of them was appointed is consistent with the adoption of the pass mark: effectively it was the situation that the Claimants knew, or should have known, that if they did not perform to a certain standard they would not be appointed.

80. The final point to deal with here is the Claimant's argument that the whole selection process was a sham, designed to target them and ensure that they would be made redundant. In support of this they point to the fact that no-one has yet been appointed to the new role on a permanent basis, and it is being covered by Ms Cooper and CWE between them.

81. Mr Heath and Ms Cooper gave inconsistent evidence as to whether the Respondent now intends to fill the role or leave the existing arrangements in place. However having considered all the evidence I am satisfied on the balance of probabilities that after the Claimants had been made redundant the Respondent intended to carry out a recruitment exercise for the new role. Since then the pandemic has struck. As a result of lockdown restrictions, the revenue from window and specialist cleaning has reduced dramatically as so few offices were inhabited. Where the Respondent has recruited, this has related to new business areas such as chemical spraying. I find that the reason why the post has not yet been filled relates to the significant change of circumstances that affected all employers from Spring 2020. I find on the balance of probabilities that the restructuring exercise was not predetermined and did not have the objective of removing the Claimants from the business.

82. In summary, I find that the selection process adopted by the Respondent was reasonable in all the circumstances. They made reasonable efforts to ensure that the interview process was as objective as possible. Whilst I understand that both Claimants were very unhappy with how they were scored, I cannot conclude on the evidence that the failure to select them was capricious or biased.

83. Finally I consider the question of whether the Respondent reasonably considered whether any alternative employment could be offered to the Claimants. I note that both of them were sent a link about redeployment and were given access to all available vacancies within the company. Both filled out an Alternative Employment form. Ms Cooper contacted the Sales Director about vacancies and HR made enquiries about whether there were roles within specific business areas. Unfortunately nothing came of this exercise.

84. I have seen an email dated 26 November 2019 from HR to the First Claimant in which his attention is drawn to a vacancy in Healthcare. He is asked to supply his CV if he is interested. The First Claimant replied within twenty minutes to say that he could not apply for the role for personal reasons. The same offer was not made to the Second Claimant. It was not clear why. However he agreed that he could have applied for any role within the business. He could not recall seeing the Healthcare role advertised. He did not apply for any alternative role within the Respondent.

85. I find that the Respondent made reasonable efforts to consider whether the Claimants could be offered alternative employment.

86. I will conclude by saying that I entirely understand the reasons why the Claimants brought this claim. In the autumn of 2019 they had both had positive appraisals. They had little reason to consider that the performance of their business divisions was not satisfactory to the Respondent. The mid-year results, and the proposal to put them at risk of redundancy, must have come 'out of the blue'. The redundancy process was completed within a matter of weeks. It is perhaps not surprising that they feared a hidden agenda and distrusted the motives of their line management. Having considered all the evidence however I find that a genuine redundancy situation had arisen and the Respondent acted reasonably in dismissing the Claimants for that reason.

87. The claim for unfair dismissal does not succeed.

Claim for Breach of Contract by First Claimant

88. I have set out above the communications between the First Claimant and the Respondent related to commission.

89. The First Claimant says that he was never paid commission and that he is owed a figure he estimates to be in the region of £30,000. In his witness statement and in his schedule of loss, he sets out the contracts he sold or 'upsold' to existing clients. He provides estimated revenue figures and profit margins on each. His case is that he is entitled to 3% of the revenue on each contract.

90. The Respondent's case is that the commission arrangements were never signed off. PT left the business soon after the email exchanges between himself and the First Claimant had taken place. No commission scheme was introduced and none of the regional directors have ever received commission. They point to the fact that the contracts issued to the First Claimant all state that commission rates were 'to be agreed' and suggest that no binding contract to pay commission had ever been entered into.

91. In her witness statement Ms Cooper says that if the First Claimant 'upsold' to any existing client, he would be required to provide contract costs to the Regional Operations Managers who would liaise with the client to confirm the works and finalise the contracts. When such work contracts are arranged, invoices would be submitted to the clients and processed by Mitie and there would be a record of them. At paragraph 75.6 she adds 'this is not to say that our own team cannot bring in new clients, but it is rare as we mostly work in tandem with Mitie Cleaning'. She says that to her knowledge this never happened with the First Claimant and he has never 'upsold' to any existing clients.

92. Ms Cooper comments that the specialist cleaning teams would often be called upon to provide periodic services to existing clients. The work would largely come through Mitie Cleaning and it would be rare for the specialist teams to

liaise with the client. TCS would usually work on a 'pay as you go' basis. Clients would be invoiced for the work rather than pay a fixed fee. If such work is carried out, an invoice would be prepared and added to the monthly journal of works. Unless an invoice was issued, the client would not be charged. Ms Cooper's position is therefore that the First Claimant is not entitled to any commission.

93. Ms Cooper then provides details on each client/contract that the First Claimant refers to in his commission claim, commenting on the figures he has provided. In a number of cases, she argues that no invoice for any additional work can be traced and therefore no commission can be due. In other cases, she argues that the First Claimant's claim relates to an 'existing client and not an upsold, new contract'. (I do not quite understand this distinction as the memo from PT makes it clear that commission would be payable on new work sold to existing clients and not just to new clients).

94. Ms Cooper agrees that the First Claimant was asked to submit invoices in relation to the following work:
    a. £23,333 for Deloitte One New Street
    b. £29,929 for Stansted Airport Deep Clean
    c. £12,800.17 for Salesforce Tower.

95. There is a confusing comment about the First Claimant's claim for commission due on some work carried out for BBC World. She says (paragraph 75.9.14 of her statement) 'the total works for this client amounted to £8048.44, this was all periodic work with the exception of £1320, however this was still a work order rather than a new contract'. Ms Cooper also says that an invoice for Salesforce Tower was issued for the amount of £12,800.17 but she does not say whether this had been submitted by the First Claimant.

96. The First Claimant claims that he sold a contract to Princess Alexandra and that the revenue figure was £43,560.00. Ms Cooper comments 'this

was a deep clean project and James did sell this, however the margin was wrong'. She does not provide an alternative revenue figure for this contract although she says that the profit margins quoted by the First Claimant were incorrect. Reference to profit margins by the First Claimant appear to be something of a red herring as the emails clearly say that commission would be calculated on revenue not profit.

97. My conclusions on the commission claim are as follows.

98. I find that the email from PT to the First Claimant dated 20 September 2017 and timed at 21.10 (page 152-153) contains a clear offer to pay him commission in addition to the rest of his salary and benefits package. The terms of the offer are clear and should be given their natural meaning: 'if you bring in any sales from your own prospecting or upsell additions to current contracts you will be eligible for commission payments'. On the basis of the package being offered to him, I find that the Claimant agreed to transfer to the new role on the basis of the package offered to him, including commission.

99. It is true that PT goes on to say that commission rates are 'yet to be fully agreed with the whole team'. The contract of employment sent to the First Claimant also stated 'commission rates to be agreed'. There is then however a further crucial exchange. The First Claimant asked for the commission rates to be confirmed on 5 October 2017. PT replies that he will set out the commission values and rates for all soon but it 'looks likely they will be – 3% for a lead and 6% for a contract'. The First Claimant asked for these to be included in the contract. PT replies on the same day that he won't put them in the contract 'as these values could change upwards as time progresses'. He sent across the document he refers to as the 'commission rules and values'. This document has not been available to the tribunal. The First Claimant says, and I accept, that this document did not say anything different to what had been said already about the commission rates.

100. I have considered these documents carefully. Taking all the evidence into account I find that the contractual offer made to the First Claimant is that he would receive commission of *no less* than 3% or 6% on new sales or 'upsold additions' to current contracts.

101. Whilst the contractual documentation sent to him states that commission rates are to be agreed, the inclusion of this provision makes it clear that there was an intention to offer commission to the First Claimant as part of his package. It is not as if the contract is silent about commission. I also find that the contractual terms must be read alongside PT's emails of 5 October 2017 where he explains why the rates are not being included in the contract: because they might be moved *upwards* and for no other reason. He does not say anything about a need for further approval from higher management.

102. The Respondent asserts that the commission arrangements were never 'signed off'. The First Claimant says that this is not his problem, and I agree with him. PT is described as a director on his email sign-off. He had ostensible authority to enter into a contract on behalf of the Respondent. It may well be that the Respondent decided not introduce commission for the team as a whole after PT's departure, but by that point I find that a binding agreement with the First Claimant had already been reached.

103. I do not accept that the First Claimant had 'accepted' any breach of contract in that the Respondent failed to pay him commission from November 2017 until the conclusion of his employment. He raised this failure in August 2018 in his exchanges with Ms Cooper over his expenses. He raised it again during his appeal. There was no affirmation.

104. I therefore conclude that the First Claimant can show a contractual entitlement to commission. However has he demonstrated that in practice there are any sums due to him?

105. I have to say that the evidence presented by both parties in relation to the commission claim is confusing and unsatisfactory. The First Claimant has provided a list of client names and figures in his schedule of loss and in his witness statement. He agrees that his figures are estimated and he does not provide detail as to his involvement in securing the additional work.

106. I have found Ms Cooper's evidence on this aspect hard to follow. I understand her central point that no commission terms were finalised. However her comments on the specific claim are not clear. She does not explain any distinction between what she calls 'periodic' work and what she means by 'upsold' new work. She does not deal with the fact that PT's email suggests commission is payable on new work agreed for existing clients.

107. Having considered carefully what both witnesses have said about the specific contracts, I come to the following conclusions.

108. It is for the Claimant to establish an entitlement to commission on the balance of probabilities. Where he relies on estimates, that presents a difficulty in establishing whether any sum is in fact due. He has not been able to provide any documentary evidence in support of his figures.

109. I accept the evidence of Ms Cooper that where new work was won or 'upsold' it should have been properly recorded in the books of the Respondent. Ms Cooper has clearly done an audit of the records in relation to each contract claimed. In a number of cases she says that no invoice can be traced. If no invoice can be traced, the client has not been charged and there is no evidence that the Respondent has had the benefit of any additional income. In all these cases I find that the First Claimant has not established on balance that he is entitled to commission.

110. There are however four contracts where Ms Cooper agrees that invoices for additional work were issued: Deloittes, Salesforce, Stansted Airport

and BBC World. In each case Ms Cooper asserts that this was not an 'upsold, new contract' but she fails to explain what she means by that. She appears to distinguish between that and 'periodic' work by which I believe that she is possibly referring to additions to an existing contract in the normal course of business. The issue with that is that I can see no reason why this should not fall within PT's description of 'upsell additions to current contracts' (page 153). I agree however that the First Claimant would not be entitled to commission where any additional work came through Mitie Cleaning as opposed to the First Claimant's efforts. His witness statement lacks detail on such efforts. I have therefore only identified projects where Ms Cooper agrees that it was the First Claimant who had 'submitted' the invoice: Deloitte One New Street and Stansted Airport.

111. In relation to the BBC World and Salesforce work, Ms Cooper agrees that invoices for additional work were raised but she does not comment on whether this was work obtained by the First Claimant or work which came through Mitie Cleaning. Her statement is unclear. In both cases she says that the First Claimant would have needed to provide a quote for the new work. She does not say whether or not he did so, but says that commission is not due as 'this was not an upsold, new contract'. I have doubts about this assertion as the basis of the Respondent's defence, as stated above. However the Claimant did not challenge Ms Cooper on how this work came about and his role in obtaining it. I am therefore left in a position of uncertainty in relation to these contracts. I remind myself that the burden is upon the Claimant to prove his case in relation to his breach of contract claim. I am not able to conclude, from the evidence presented to me, that it is more likely than not that the Claimant was responsible for sourcing the additional work done for BBC World and Salesforce. I therefore do not award any unpaid commission in relation to these contracts.

112. Ms Cooper agrees that the First Claimant sold a deep clean project to Princess Alexandra.

113. I conclude on the balance of probabilities that the First Claimant has shown that he was responsible for obtaining new or 'upsold' work on three contracts: Princess Alexandra, Deloitte One and Stansted Airports. In relation to Princess Alexandra, I accept the First Claimant's revenue figure as the Respondent does not challenge it. In relation to Deloitte One and Stansted Airport I accept the revenue figures provided by Ms Cooper in her witness statement as this is based upon her review of issued invoices. The total revenue from these three contracts comes to £96,822.75. The First Claimant seeks three per cent of that amount, a sum of £2904.00. I award him that sum by way of damages for breach of contract in relation to the Respondent's failure to pay him commission due under contractually agreed terms.

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Employment Judge Siddall
Date: 2 November 2021

Judgment sent to the parties and entered in the Register on:
Date: 1 December 2021

for the Tribunal Office